Filed 11/1/16 P. v. Gatlin CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CLIFTON GATLIN, Defendant and Appellant.	B266811 (Los Angeles County Super. Ct. No. GA095961)

APPEAL from a judgment of the Superior Court of Los Angeles County. Henry J. Hall, Judge. Affirmed with directions.

California Appellate Project, Jonathan B. Steiner, Executive Director, and Joshua H. Schraer, Staff Attorney, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and Stacy S. Schwartz, Deputy Attorneys General, for Plaintiff and Respondent.

In an information filed by the Los Angeles County District Attorney's Office, defendant and appellant Clifton Gatlin was charged with two counts of corporal injury to spouse (Pen. Code, § 273.5, subd. (a); counts 1 & 2);[1] disobeying a domestic relations court order (§ 273.6, subd. (d); count 3); vandalism (§ 594, subd. (a); count 4); two counts of criminal threats (§ 422, subd. (a) (counts 5 & 6); and assault with force likely to produce great bodily injury (§ 245, subd. (a)(4) (count 7). As to counts 2 and 7, it was alleged that defendant personally inflicted great bodily injury within the meaning of section 12022.7, subdivision (e).

Defendant pleaded not guilty and denied the special allegations. The jury found defendant guilty on counts 1, 3, 5, and 6. Probation was denied and defendant was sentenced to five years in state prison. Various fines were imposed, including a $400 domestic violence restitution fine pursuant to section 1203.097.

Defendant timely appealed. On appeal, he argues that (1) one of his two convictions for making criminal threats must be reversed because there was only one criminal threat as a matter of law, (2) the trial court committed reversible error when it instructed the jury that conduct that constituted one offense could support convictions for two counts, and (3) the trial court erred when it imposed a domestic violence restitution fine pursuant to section 1203.097.

We agree that the trial court erred in imposing a $400 domestic violence restitution fine pursuant to section 1203.097. We therefore strike the fine. In all other respects, we affirm.

FACTUAL BACKGROUND

I. Prosecution Evidence

On March 24, 2015, Maureen P. (Maureen) received several "vulgar" and "threatening" text messages from defendant, her husband, while she was at work. The messages began around 8:00 a.m. and continued until around 4:00 p.m. One of the

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

messages stated that defendant was going to "fuck up [her] son." She believed defendant's threat because he also sent a picture of himself in front of her son's school. Defendant also wrote that he "was not going out like a chump" and that he was going to "'give you motherfuckers a reason to fear me.'" Maureen understood this text to refer to herself, her son, and her friend Patrick, who defendant believed threatened his mother.

When Maureen got home from work, defendant began "yelling and screaming" at her for about 20 to 30 minutes. At one point, defendant shoved Maureen into a doorway; later, he pushed her in a hallway. She lost her balance and slammed into a wall. The police arrived, and defendant was removed from the property. At the time, Maureen had a valid restraining order against him.

II. Defense Evidence

Defendant took the stand and denied ever hurting Maureen. According to defendant, he was "very angry" and "insecure" on the day he sent the threatening text messages to Maureen because one of her friends had threatened him and his mother. Defendant wanted Maureen to "understand what it feels like when someone threatens your parent or a relative or anybody of your family." Defendant wanted her to feel "horrible." Although Maureen assured defendant that his mother was safe and insisted that he calm down, defendant refused. After Maureen asked him not to involve her son in the argument, defendant told her that "he wasn't going to be your son today." At the time, defendant wanted Maureen to think that he was going to hurt her son.

DISCUSSION

I. *Criminal Threats*

Defendant contends that one of his two convictions for making criminal threats must be reversed because there was only one criminal threat as a matter of law.

A. Relevant Law

Section 422, subdivision (a), provides, in relevant part: "Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there

is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison."

The prosecution must prove: "(1) that the defendant 'willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,' (2) that the defendant made the threat 'with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,' (3) that the threat—which may be 'made verbally, in writing, or by means of an electronic communication device'—was 'on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,' (4) that the threat actually caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety,' and (5) that the threatened person's fear was 'reasonabl[e]' under the circumstances. [Citation.]" (*People v. Toledo* (2001) 26 Cal.4th 221, 227–228 (*Toledo*).)

To the extent defendant is challenging the sufficiency of the evidence, we review the criminal conviction for substantial evidence. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Whether the evidence could support more than a single criminal threat conviction is a question of law that we review de novo, based upon the elements of section 422. (*People v. Wilson* (2015) 234 Cal.App.4th 193, 198 (*Wilson*).)

B. Analysis

All five elements are supported by substantial evidence here. Defendant sent Maureen numerous text messages threatening to commit a crime that would result in death or great bodily injury to another person; he made the threats with the intent that his statements be taken as threats; the threats conveyed an immediate prospect of execution;

the threats caused Maureen to sustain fear for her own safety and the safety of her son; and her fear was reasonable.

Relying upon *Wilson, supra*, 234 Cal.App.4th 193, defendant contends that one of his two convictions must be reversed because Maureen was the only victim of the threats and she sustained one single period of fear for the duration of the text message conversation.

In *Wilson*, the victim returned home from purchasing groceries with his wife and encountered the defendant, who was apparently drunk, urinating on a tree in the victim's yard. Over the course of 15 to 20 minutes in a single, continuing confrontation with the victim as he unloaded the groceries, the defendant's verbal statements escalated from, "'Fuck off. Everyone has to take a piss'" to "'I'm going to kill you and all your kids and your family'" and "'I'm going to kill you guys.'" (*Wilson, supra*, 234 Cal.App.4th at pp. 196–197.) The prosecutor charged the defendant with making two criminal threats against the victim: first, the initial threat that the victim discounted personally but caused him to fear for his family, especially his children, and second, the additional threat directed at the victim as the defendant moved closer, so that he feared "'not just my children's life anymore as protector and provider, but now also myself.'" (*Id*. at pp. 197–198.)

After the jury convicted the defendant on both counts and the defendant appealed, a panel of this court reversed the defendant's second criminal threat conviction. Because "[a] violation of section 422 is not complete upon the issuance of a threat," but instead "depends on the recipient of the threat suffering 'sustained fear' as a result of the communication," *Wilson* held: "It is not appropriate to convict a defendant of multiple counts under section 422 based on multiple threatening communications uttered to a single victim during a brief, uninterrupted encounter." (*Wilson, supra*, 234 Cal.App.4th at p. 201.)

The *Wilson* court observed that while section 422 "provides two alternative means by which the victim's fear could manifest itself — fear for oneself or fear for one's immediate family members," the Legislature did not enumerate these instances of fear as

separate crimes in "separate statutory subdivisions," but rather "identif[ied] different circumstances in which the single crime defined by the statute can be committed." (*Wilson, supra*, 234 Cal.App.4th at pp. 201–202.) Consequently, the court "reject[ed] the notion that a single threat referencing violence against both a victim and his or her immediate family members, heard only by the victim, can constitute multiple offenses under section 422." (*Id*. at p. 201.)

Reviewing the threats against the victim (Rosales) in that case, *Wilson* also explained: "Neither defendant's utterance of more than one threat nor the shift in focus of Rosales's fear over the course of the ordeal justifies two section 422 convictions. From the moment defendant approached Rosales near his car and threatened to kill Rosales's family, the jury's guilty verdicts necessarily suggest Rosales was in sustained fear throughout the entirety of the confrontation. It does not matter whether Rosales's primary fear was for himself or members of his family at various times. Irrespective of the number of threatening statements and family members threatened, defendant was properly convicted of only one count under section 422 for his conduct toward Rosales." (*Wilson, supra,* 234 Cal.App.4th at p. 202.)

Defendant's reliance on *Wilson* is misplaced for the simple reason that here the jury reasonably could conclude the "immediate prospect of execution" necessary to complete a criminal threat under section 422, subdivision (a), dissipated between the first and second threats uttered to Maureen, unlike in *Wilson*. In *Wilson*, the victim always remained outside his home and engaged with the defendant in a single, continuing confrontation, or as *Wilson* put it, "a brief, uninterrupted encounter." (*Wilson, supra*, 234 Cal.App.4th at p. 201.) Here, in contrast, defendant's threats to Maureen lasted throughout the day. At least one of the threats was directed at Maureen herself while others were directed at her son. And, Maureen testified that she understood the "chump" threat to be directed at herself, her son, and her friend Patrick.

Defendant argues that the whole episode constituted a single period of "sustained fear" for Maureen, as for the victim in *Wilson*. But as noted above, in the instant case, the threats were made at different times of the day (not within a single 15-minute

conversation as in *Wilson*) and had different objectives. Under these circumstances, the jury could reasonably have concluded that the threats were separate and distinct not only because defendant uttered them at different times against Maureen, but also in their intent. He threatened to hurt Maureen in one of the text messages because he was angry about the alleged threat to his mother. The additional threats against Maureen's son were made to make Maureen feel "horrible" and understand the fear he felt about his mother.

Moreover, the facts here touch on an aspect of the "sustained fear" necessary for a criminal threat that *Wilson* did not have to discuss. A criminal threat must cause the victim more than a passing fright or scare. As *Wilson* noted, "[s]ustained fear occurs over 'a period of time "that extends beyond what is momentary, fleeting, or transitory."' [Citation.]" (*Wilson*, *supra*, 234 Cal.App.4th at p. 201.) But a distinct and equally important element is that the utterance must elicit fear in the victim because of """"an immediate prospect of execution of the threat."""" (*Toledo*, *supra*, 26 Cal.4th at p. 228.) Sustained fear and an immediate prospect of execution are related elements, but not identical, and both are required. (See *ibid*. [listing them as distinct parts of the fourth and fifth elements of a criminal threat, respectively].) Thus, where there is sustained fear, but no new threat or new prospect of its execution, it follows that there is only one criminal threat. And as illustrated in *Wilson*, where there is sustained fear and perhaps additional threats, but there exists in the "uninterrupted encounter" no new prospect of execution of the threats, there is only one actionable "'unit of prosecution'" under section 422. (*Wilson*, *supra*, 234 Cal.App.4th at pp. 199, 201.)

Here, however, where there is a new threat, a new prospect the threat will be executed, and a new period of sustained fear, and the other elements of a criminal threat under section 422 are also present (see *Toledo*, *supra*, 26 Cal.4th at p. 228), the defendant may be prosecuted and convicted of the new threat as well as prior ones. Of course, the prior threat or threats likely will color and deepen the victim's fear. But here the evidence was more than sufficient for a jury reasonably to conclude all the elements of multiple criminal threats were satisfied.

II. Alleged Instructional Error

Defendant contends that the trial court improperly responded to the jury's questions during deliberations.

A. Background

During deliberations, the jury sent the following note: "What is the difference between count 5 and 6?" The trial court asked the parties for input regarding a response. The prosecutor responded, "Your Honor, the People's suggestion is that we indicate that count five and six are-count five reflects the criminal—that they're broken up to count five reflecting the criminal threat to Maureen . . . and count six, the criminal threat to her son." The trial court asked defense counsel if that was "agreeable" with her and she responded, "That's fine."

A short time later, another note from the jury was received. It read: "With counts 5 and 6, does count 5 (threats to Maureen P) have to meet the same characteristics as count 6? In other words, the jury instructions state that [defendant] 'threatened to unlawfully kill or unlawfully cause great bodily injury to Maureen P. or members of her immediate family.' Does a single threat, made to Maureen P. threatening harm to her son constitute two violations of the law, and two counts, or does the separate count for Maureen P. refer separately to [defendant] threatening harm to Maureen P.?"

The trial court again discussed the matter with the parties. Following such discussion, the trial court stated: "[T]he record should reflect we've had a conversation about this and I'm going to go through the language as I write it down for the jury. [¶] As to question number one, I'm going to answer as follows: [¶] 'If you determine that there was a threat it is up to you to determine whether one or more than one separate threats were made.['] [¶] 'Multiple threats may be communicated to the same person.' [¶] Is that what we agreed upon for the answer for the first question?" Defense counsel replied, "Yes."

The trial court then responded to the jury in writing: "If you determine that there was a threat it is up to you to determine whether one or more than one separate threats

were made. Multiple threats may be communicated to the same person. You are referred to instruction 1300 for [the] definition."

The next day, both parties submitted revised responses to the jury's notes. The trial court asked both counsel if they agreed that a revised answer could be submitted to the jury. Defense counsel indicated that she did not get a chance to review the language. The trial court gave her the opportunity to review the language, and she then proposed one change: "The only change I would make would be regarding [Maureen] or regarding her status, just to add harm to her son or threat to her son." The prosecutor agreed and, with that change, the trial court submitted the matter to the jury.

The change written to the jury was as follows: "Further clarification re counts 5 & 6. [¶] Both counts are alleged threats to Maureen P. [¶] —Count 5 is only alleged threats to Maureen P regarding her. [¶] —Count 6 is any alleged threats to Maureen P regarding harm to her son."

B. Forfeiture

Because defendant failed to object below on the grounds he raises on appeal, his argument has been forfeited unless his substantial rights were affected. (§ 1259.) As set forth below, the trial court's response to the jury's questions was a correct statement of law. Therefore, his rights were not adversely impacted.

C. No Error

Applying the de novo standard of review (*People v. Posey* (2004) 32 Cal.4th 193, 218), we find no error. As set forth above, defendant's argument is not supported by case law or the appellate record. The trial court did not advise the jury that the evidence could support convictions for two counts of making criminal threats. Rather, it informed the jury, using language agreed to by defense counsel, that different counts pertained to threats involving different victims.

The trial court also correctly advised the jury that it needed to determine if one or more threats were made by defendant, with the understanding that multiple threats could be communicated to a single person. While the *Wilson* court determined that the specific facts of that case did not involve multiple threats (*Wilson, supra*, 234 Cal.App.4th at

pp. 201–202), it did not create a rule of law whereby multiple threats could not be made to a single person.

Thus, there was no error.

III. *Domestic Violence Restitution Fine*

The trial court imposed a $400 fine pursuant to section 1203.097, subdivision (a)(5). Because defendant was not granted probation, this fine must be stricken.

DISPOSITION

The $400 fine imposed pursuant to section 1203.097 is stricken. The matter is remanded to the trial court to prepare an amended abstract of judgment showing no fine pursuant to section 1203.097. In all other respects, the judgment is affirmed.

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_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT